

No. 1-09-0516

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE APPELLATE COURT  
OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 23416
	)	
COREY PAIGE,	)	
	)	Honorable
Defendant-Appellant.	)	Mary Margaret Brosnahan,
	)	Judge Presiding.
	)	

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PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.  
Justices Lavin and Pucinski concurred in the judgment.

**ORDER**

*HELD:* Trial court did not improperly restrict defendant's cross-examination of a state witness by allowing the State to elicit testimony regarding a threat made to the witness on redirect in the event defense counsel cross-examined the witness on a financial benefit she was to receive from the State where such evidence would have been admissible under the doctrine of curative admissibility. Defendant's procedural default of his claim that the trial court failed to question prospective jurors in compliance with Supreme Court Rule 431(b) is not excused under the first prong of the plain-error doctrine. Trial court did not abuse its discretion by declining to give an addit instruction requested by defense counsel where the jury was fully apprised of the witnesses' drug use and the instruction might have unduly highlighted that one particular aspect of the witnesses' character or ability to perceive. Defendant's mittimus should be corrected to reflect that he is entitled

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to 893 days of presentence custody credit.

Following a jury trial, defendant Corey Paige was found guilty of first degree murder and sentenced to 40 years' imprisonment. On appeal, defendant contends that the trial court improperly restricted his cross-examination of a state witness, failed to question prospective jurors in compliance with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)), and erred by refusing to give the jury an addit instruction. He also contends that his mittimus should be amended to accurately reflect his presentence custody credit. We affirm and amend the mittimus.

#### BACKGROUND

Defendant and codefendants, Alejandro Serrano and Juan Gonzalez, were charged with first degree murder in connection with the September 12, 2006, shooting of Juliano Robles. Prior to trial, the court granted defendant's petition to sever his trial from that of his codefendants and ordered that he be tried at the same time, but by a separate jury. Gonzalez did not appear for trial and was tried *in absentia*.

At trial, Jazmin Ruano, Robles' older sister, testified that on September 11, 2006, she was living with her mother and Robles. That night, Ruano went to a movie with her boyfriend, and then went to her boyfriend's house, which was about two blocks away from her mother's house. Ruano arrived at her boyfriend's house around midnight, and Robles was standing outside. They talked for a short time, and Ruano went inside and told Robles to call her when he was going home. About 30 minutes later, Ruano heard three gunshots and called Robles. Ruano walked toward her mother's house because Robles was not answering his phone and found him lying on

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the sidewalk. It appeared that Robles had been shot in the head.

After Ruano testified, the prosecutor informed the trial court that Reyna Ortiz, a state witness, had contacted the prosecutor a week earlier and said that unknown men wearing hoods had been looking for her. The men went to her sister's house and said that they were hired to make sure that Ortiz did not testify, "however they needed to do that." Ortiz and her mother subsequently met with the State's relocation unit, and Ortiz told the prosecutor that although she had not yet received any money from the State, she would be receiving help with moving expenses and the first month's rent once she found an adequate place to live. The prosecutor explained that the State did not intend to introduce any evidence regarding the alleged threat.

Defense counsel asserted that the promise of future compensation from the State would be a legitimate matter to bring out during the cross-examination of Ortiz and that the State should not then be allowed to go into the details of the threat because a nexus had not been established between defendant and the alleged threat. The court ruled that if defense counsel inquired as to the benefits Ortiz might receive during cross-examination, the State would then be allowed to inquire as to the reason Ortiz was seeking relocation. Defense counsel responded that in light of that ruling, the defense would not ask Ortiz any questions on the subject.

Ortiz testified that she was at her sister's house with her friend Veronica Rodriguez between 8 and 9 p.m. on September 11, 2006. Ortiz and Rodriguez wanted to return home, so Ortiz called her friend Chico, and Ortiz and Rodriguez walked to a Walgreens at the intersection of 47th Street and Ashland Avenue, where Chico was waiting with his gray van. Ortiz and Rodriguez sat in the back of the van, while Chico was in the driver's seat, and a man in a red

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shirt sat in the front passenger seat.

Ortiz was asked whether Chico or the man in the red shirt were present in the courtroom, and she responded that she did not see either person. Ortiz was then presented with People's Exhibit Number 3, which she identified as a photograph of Chico that showed how he looked in 2006. Detective Roger Sandoval subsequently testified that People's Exhibit Number 3 was a photograph of codefendant Gonzalez. Ortiz was also presented with People's Exhibit Number 12, which she identified as a photograph of the man in the red shirt that showed how he looked in 2006. Detective Sandoval subsequently testified that People's Exhibit Number 12 was a photograph of codefendant Serrano.

Gonzalez drove to a store and bought beer and cigars, which were used to make blunts. A blunt is a cigar in which the tobacco has been replaced with marijuana. Gonzalez then drove them to Lincoln Park, where they drank the beer and smoked the blunt, then to an alley, where Serrano exited the van and went into a building. Serrano was carrying a gun when he returned, and sat down in the driver's seat. Gonzalez moved to the back of the van and Rodriguez sat in the front passenger seat. Serrano handed the gun to Gonzalez, who cleaned it and put bullets in it.

They next picked up Creeper, who sat down in the back of the van with Ortiz and Gonzalez. Ortiz was asked whether Creeper was present in the courtroom, and she responded that she did not see him. Ortiz was then presented with People's Exhibit Number 13, which she identified as a photograph of Creeper that showed how he looked in 2006. Detective Sandoval subsequently testified that People's Exhibit Number 13 was a picture of defendant that Ortiz had

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identified shortly after the shooting. Although Ortiz was not in a gang on September 11, 2006, she had been in the Lady Souls gang for two years, and knew that all three men were members of the Ambrose street gang.

Gonzalez resumed driving the van after they picked up defendant and returned the gun to Serrano, who then sat in the back with defendant and Ortiz. Gonzalez drove to 42nd Street and said that they were going to shoot at the Satan Disciples, a rival gang. When they reached 42nd Street, Serrano exited the van, shot at a group of gang members, and reentered the vehicle. Gonzalez drove them back to the area in which Serrano had originally obtained the gun. While there, Gonzalez cleaned out the gun and the men talked about where to go next. The men ultimately decided to go to 26th Street, where they expected to find members of the Latin Kings, another rival gang.

Upon arriving in the 26th Street area, defendant suggested that someone represent that they were in the Latin Kings by making their gang sign. Gonzalez subsequently made that hand gesture and stopped the van. Defendant and Serrano, who had the gun, exited the van, and Ortiz, who had crouched down in the back of the van, heard four gunshots. Defendant and Serrano then reentered the back of the van, and Serrano said "I got him, I got him. He is dead."

Gonzalez then drove to 18th Street, which was within the territory of the rival LaRazza gang, and Serrano handed him the gun while they were on their way. Defendant told Gonzalez to say "LaRazza love," and Gonzalez exited the van, said "LaRazza love," stood in front of the van, and shot at LaRazza gang members. Gonzalez got in the back of the van and emptied the bullets out of the gun, and Serrano jumped in the driver's seat and drove away. As they drove away,

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Gonzalez gave the gun to defendant, who then returned the gun to Gonzalez.

After they drove away, Ortiz heard police sirens and realized that they were being chased by the police. Gonzalez moved into the front passenger seat of the van and threw the gun out the window as they drove by a McDonald's restaurant on Western. After driving for a while longer, Serrano stopped the van near an expressway because the road was blocked off by construction. Defendant, Gonzalez, and Serrano jumped out of the van and ran away, while Ortiz and Rodriguez remained inside until the police arrived. Ortiz further testified that from the time she first entered Gonzalez's van to the time the police found her and Rodriguez in the van, she drank a beer or two and shared in smoking four blunts with Rodriguez, Gonzalez, and Serrano.

On cross-examination, Ortiz stated that she was smoking four or five blunts a day at the time of the shooting. Ortiz also stated that she got high in the van with Rodriguez, Gonzalez, and Serrano while they were on their way to Lincoln Park and that they smoked additional blunts afterward. She explained that she was "pretty wasted" that night and that smoking marijuana affected her memory, but did not affect her perception or the way she saw things. Ortiz further stated that there were only two shootings, at 26th Street and at 18th Street, and that although someone jumped out of the van at 42nd Street, no shooting had occurred there.

Veronica Rodriguez testified that she was 16 years old on September 11, 2006, and that she was drinking with Ortiz at Ortiz's mother's house that evening. Rodriguez and Ortiz later walked to a Walgreens to meet Ortiz's friend Chico, and got into the backseat of his black and gray van. Chico sat in the driver's seat, and a man wearing a red shirt, who Rodriguez identified in court as Serrano, was in the front passenger seat. Rodriguez identified People's Exhibit

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Number 3, which Detective Sandoval later testified was a picture of Gonzalez, as a picture of Chico that showed how he looked in 2006, except that his hair was styled differently.

The four of them went to a convenience store and bought two cases of beer and two cigars, which were used to make blunts, and then went to the Lincoln Park Zoo, where they spent about two hours drinking the beer and smoking the marijuana. They subsequently stopped somewhere to pick up Creeper, who Rodriguez had known for about two months and had heard was in the Ambrose street gang. Creeper gave Gonzalez the Ambrose gang handshake and sat in the back of the van with Rodriguez and Ortiz. Rodriguez was asked if Creeper was present in the courtroom, and she responded that she did not see him. Rodriguez also testified that she met with police officers and a state's attorney on the afternoon of September 12, 2006, at which time she identified People's Exhibit Number 4 as a photograph of Creeper. Detective Sandoval later testified that People's Exhibit Number 4 was a photograph of defendant that Rodriguez had identified as Creeper shortly after the shooting.

Gonzalez drove them to an alley, where Serrano exited the van and returned with a pistol in his hand. Serrano handed the gun to Gonzalez, who drove them to the intersection of 26th Street and Sacramento Avenue, and Serrano then reclaimed the gun from Gonzalez and jumped out of the van with defendant. Rodriguez heard four or five gunshots, and then heard someone say "King killer, Ambrose love." Rodriguez did not see where Serrano and defendant went after they exited the van, and did not know who said "King killer, Ambrose love." Serrano and defendant jumped back into the van, and Serrano was holding the gun when they did so. Serrano sat in the driver's seat, defendant sat in the front passenger seat, Gonzalez sat in the back with

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Rodriguez and Ortiz, and they drove away.

Serrano subsequently stopped the van in an alley, at which time Gonzalez exited and then reentered the van, and they drove away. Rodriguez did not know what happened while Gonzalez was outside of the van. After they drove away, Rodriguez could hear police sirens, and they drove very fast with the music playing loudly. The van eventually came to a stop, and defendant, Serrano, and Gonzalez jumped out and ran away, while Rodriguez and Ortiz remained in the vehicle.

On cross-examination, Rodriguez stated that she was drunk and high when she left Lincoln Park on the night of the shooting, and she described herself as “wasted.” She further stated that she was smoking marijuana on a daily basis at that time.

Omar Barba testified that he was 13 years old at the time of the shooting and lived with his family in a second-floor apartment on the corner of 24th Street and St. Louis Avenue. About 1 or 1:30 a.m. on September 12, 2006, Barba looked out his window and saw Robles, then talked with him for about 10 or 15 minutes. Barba was a few years younger than Robles and knew him from school. When Robles left to go home, Barba watched him ride his bicycle down 24th Street and cross in front of a van at the intersection of 24th Street and Drake Avenue. After Robles had passed in front of the van, a man wearing a black hooded sweatshirt with the hood pulled down exited from the passenger side and walked behind the van to the sidewalk where Robles was now standing. The man shot Robles, causing him to fall to the ground. He then moved closer to Robles, shot him three or four times, and reentered the van. Barba did not see anyone outside on the street other than Robles and the shooter when the shooting occurred. Barba and his mother

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ran outside immediately after the shooting and saw the van drive past them down 24th Street. On cross-examination, Barba stated that there were three people in the van.

Chicago police officer Rick Caballero testified that about 1:30 a.m. on September 12, 2006, he and his partner, Officer Kinsella, received a flash message that someone had been shot on the 2400 block of Drake Avenue. Officer Caballero spoke with a woman at the hospital at which the victim was being treated, then went searching for a gray van with a red pinstripe. The officers subsequently observed such a van speeding northbound on Kedzie Avenue near Pershing Road. There were two occupants in the van, including Serrano, who was wearing a red t-shirt and was driving the van. The officers pursued the vehicle as it proceeded eastbound on Pershing Road, then turned south on Western. Officers Caballero and Kinsella eventually ceased their pursuit because it had become unsafe and two other police units had joined the pursuit and were closer to the van.

Chicago police officer Lazaro Altamirano testified that about 2 a.m. on September 12, 2006, he was on patrol with his partner, Officer Rodriguez, when he received a flash message regarding the pursuit of a vehicle that was believed to have been involved in a shooting. Officer Altamirano activated his emergency lights and proceeded southbound on Western Avenue until he saw a man who was standing on the right side of the street in front of a McDonald's, and who was waving him down with two hands. Officer Altamirano observed a silver .44-magnum revolver laying on the street against the curb, and the officers exited their vehicle and secured the area. Officers Salgado and Peterson subsequently arrived on the scene, and Officer Salgado discovered a live round that appeared to have been from a .44-magnum on the sidewalk about 15

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or 30 feet northwest of the gun. Officer Peterson then observed four more live rounds a few feet to the north or northwest of where Officer Salgado had discovered the first round.

Marcelo Liera testified that he went to a Dunkin' Donuts near 63rd Street and Western Avenue about 2 a.m. on September 12, 2006, while on his way to work. As he exited the drive-thru, Liera saw a dark blue van speed by with police behind it and also saw someone throw something out of the passenger side of the van that bounced and sparked a couple of times. Liera pulled his car over to the location where he believed the object had landed and saw a gun lying on the street next to the sidewalk. He then exited his car, waved down a police vehicle, and showed the officers the gun.

Chicago police officer Clinton Sebastian testified that about 2:30 a.m. on September 12, 2006, he was on routine patrol with his partner, Officer Walsh, when he monitored a flash message regarding the pursuit of a gray van that was proceeding southbound on Western. Officer Sebastian drove to Western Avenue, observed a gray van speeding erratically, and joined the pursuit. Officer Sebastian continued to follow the van as it proceeded in the wrong direction on an off-ramp and onto the Skyway. The van eventually stopped because the Skyway was under construction and there was heavy machinery blocking the way, and three individuals exited the van and ran away, including Serrano, who was wearing a red t-shirt and had been driving the van. The other two individuals who exited the van, defendant and Gonzalez, looked back at the police before running away, and Officer Sebastian was able to see their faces. Officer Sebastian chased the three men and eventually caught up with Gonzalez and arrested him. Defendant and Serrano were chased down and taken into custody by other officers.

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Forensic investigator Mark Harvey testified that about 3 a.m. on September 12, 2006, he and his partner, Investigator Dunigan, went to 6158 South Western, where police officers showed them a .44-magnum revolver that had allegedly been thrown from a vehicle window and five cartridge cases. The revolver was located on the street near the curb and the five live cartridges were located on the sidewalk in a small planting area near a McDonald's, and the investigators photographed the scene and collected evidence.

Cook County medical examiner John Scott Denton testified that he performed an autopsy on Juliano Robles on the morning of September 13, 2006, and that the autopsy revealed that he had suffered gunshot wounds to his head, left elbow, and abdomen. During the autopsy, Dr. Denton removed a large caliber lead core bullet and three small copper jacket fragments from the gunshot wound to Robles' abdomen and removed a copper jacket fragment from the wound to his head.

Brian Parr, a forensic scientist specializing in firearm and tool mark identification, testified that he examined and test fired the gun recovered by Investigator Harvey and examined the firearm evidence recovered by Dr. Denton. Parr opined within a reasonable degree of scientific certainty that a fired bullet jacket fragment and fired bullet jacket found in Robles' body were fired from the gun recovered by Investigator Harvey.

Forensic scientist Mary Wong testified that gunshot residue testing of defendant's hands revealed that he may not have discharged a firearm or come in contact with a primary gunshot related item, and that if he had, the gunshot residue particles had been removed by activity, were not detected, or were not deposited. Wong explained that gunshot residue evidence may be

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removed from a subject's hands by sweat or by activities such as running and jumping.

Chicago police detective Roger Sandoval made in-court identifications of defendant and Serrano and testified that he spoke with Ortiz at 11:19 a.m. on September 12, 2006, at which time she viewed photographs of defendant, Serrano, and Gonzalez and identified them as being involved in the shooting. Detective Sandoval spoke with Rodriguez about 2:10 p.m. that same day, and she identified photographs of defendant, Serrano, and Gonzalez as well. On cross-examination, Detective Sandoval stated that he did not conduct a canvass of 42nd Street and that no physical evidence was found regarding a shooting at 18th Street during the course of the investigation. He also stated that Rodriguez had told him that she heard two voices yelling "Ambrose love, King killer" prior to hearing three shots during the shooting on 24th Street. On redirect, Detective Sandoval testified that he was not aware of any gunshot victims on 42nd Street or 18th Street and that Ortiz and Rodriguez did not provide him with specific locations for the shootings that had allegedly occurred on those streets. On recross-examination, Detective Sandoval stated that shortly after the shooting on 24th Street had occurred, he checked to see if there were any reports of shots fired near 42nd Street or 18th Street, and discovered that no such reports had been made.

Based on this evidence, the jury found defendant guilty of first degree murder, and the trial court then sentenced him to 40 years' imprisonment.

## ANALYSIS

### I. Cross-examination of Ortiz

Defendant first contends that the trial court improperly restricted his right to cross-

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examine Ortiz by ruling that the State would be allowed to introduce evidence of the threat allegedly made to her if defense counsel cross-examined her about her possible motive or bias arising from the financial assistance she was likely to receive from the State in connection with her relocation. A criminal defendant has a constitutional right to confront the witnesses against him. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This right includes a reasonable right of cross-examination into a witness' bias, interest, or motive to testify falsely. *People v. Nelson*, 235 Ill. 2d 386, 420-21 (2009).

Defendant asserts that evidence of the alleged threat was inadmissible because the State did not establish a connection between him and the threat and that it was therefore improper for the court to condition his ability to cross-examine Ortiz regarding her anticipation of financial assistance on the State's ability to introduce such evidence. The State responds that the court did not restrict defendant from cross-examining Ortiz, but merely clarified that the prosecutor would be allowed to elicit testimony explaining the reason Ortiz would be receiving financial assistance from the State if she was cross-examined on the issue, which was proper under the doctrine of curative admissibility.

Where the door to a subject has been opened by defense counsel on cross-examination of a witness, the State may, on redirect examination, question the witness to clarify or explain the matters brought out during, or to remove or correct any unfavorable inferences left by, the previous cross-examination. *People v. Thompkins*, 121 Ill. 2d 401, 444 (1988). "If *A* opens up an issue and *B* will be prejudiced unless *B* can introduce contradictory or explanatory evidence, then *B* will be permitted to introduce such evidence, even though it might otherwise be

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improper.” *People v. Manning*, 182 Ill. 2d 193, 216 (1998). The rule is merely protective, however, and extends only as far as is necessary to shield a party from adverse inferences without permitting a party to introduce inadmissible evidence merely because the opposing party brought out some evidence on the subject. *Id.* at 216-17. A trial court’s decision to admit evidence pursuant to the doctrine of curative admissibility lies within the sound discretion of the trial court, and this court will not disturb the trial court’s decision absent an abuse of that discretion. *Id.* at 217.

The State maintains that testimony regarding the threat would have been admissible on redirect pursuant to our supreme court’s holding in *People v. Thompkins*, 121 Ill. 2d 402, had defense counsel cross-examined Ortiz regarding her anticipation of financial assistance from the State. In *Thompkins*, 121 Ill. 2d at 442-43, defense counsel attempted to impeach a witness on cross-examination by bringing out the fact that he had entered into a deal with the State to drop a charge of delivery of cocaine and to relocate him in exchange for his testimony. On redirect, the prosecutor asked the witness whether he had asked for relocation because he was afraid of what might happen to him due to his testimony, and defense counsel objected. *Id.* at 443. The court overruled defense counsel’s objection, and the witness responded that he had, and indicated that he was afraid of the defendant. *Id.*

The supreme court held that the trial court did not abuse its discretion by allowing the witness to testify on redirect that he had asked the State for relocation because he was afraid of the defendant. *Id.* at 444. In doing so, the court noted that the witness had not testified that he had received threats from the defendant and explained that the subject matter of the witness’

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relocation was initially brought out on cross-examination by defense counsel in an attempt to impeach him. *Id.* The court reasoned that once defense counsel had opened the door to that subject on cross-examination, the State could then question the witness on redirect to rehabilitate him and rebut defense counsel's allusion that he was biased and had a strong motive to testify falsely. *Id.*

We determine that the facts in this case are substantially similar to those in *Thompkins* and that our resolution of this issue is therefore controlled by the reasoning set forth in that case. As in *Thompkins*, defense counsel in this case wanted to bring out the matter of Ortiz's relocation during cross-examination to impeach her with a promised future benefit that she was to receive from the State in exchange for her testimony. Just as in *Thompkins*, where it was necessary for the State to question the witness on redirect regarding his fear of the defendant to explain the reason he requested relocation, it would have been necessary in this case for the prosecutor to question Ortiz regarding how she was threatened to explain the reason she sought relocation had the matter been raised by defense counsel on cross-examination.

Thus, had defense counsel opened the door to the subject of Ortiz's relocation on cross-examination, the State would have been allowed to explain the matter on redirect by questioning Ortiz as to the reason she was relocating. The State would have been unfairly prejudiced if defense counsel had been allowed to reveal to the jury that Ortiz was to receive a financial benefit from the State and the prosecutor was then denied the opportunity to elicit testimony explaining that the financial benefit was to assist her relocation, which became necessary when she was threatened regarding her testimony. We therefore determine that the trial court did not

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abuse its discretion by ruling that the State would be allowed to question Ortiz as to the reason she was seeking relocation on redirect if defense counsel first cross-examined her regarding the promise of future compensation from the State and conclude that the court did not improperly restrict defendant's ability to cross-examine Ortiz.

Defendant maintains, however, that this case is distinguishable from *Thompkins* because in that case the witness did not testify that he had received a threat from the defendant, whereas in this case Ortiz would have testified that she had received a threat and the obvious inference from such testimony is that he was responsible for the threat. We initially note that Ortiz would not have testified that defendant personally threatened her and that the jury could have inferred that the unknown men were sent by a codefendant or that the threats were made by fellow gang members without defendant's knowledge due to the evidence that defendant and codefendants were all members of the same gang and the fact that they were all being tried at the same time.

Moreover, to the extent that the jury would have inferred from Ortiz's testimony that defendant was responsible for the threat, the court's holding in *Thompkins* still applies. Although the supreme court noted in *Thompkins* that the witness did not testify that he had received threats from the defendant, it ultimately held that the witness' testimony was admissible to rebut defense counsel's allusion that he was biased and had a strong motive to testify falsely. Similarly, in this case, it would have been necessary to allow the prosecutor to question Ortiz as to the reason she was seeking relocation had the issue been raised by defense counsel on cross-examination to rebut the inference that she had a motive to testify falsely.

## II. Supreme Court Rule 431(b)

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Defendant next contends that the trial court erred by failing to comply with Supreme Court Rule 431(b) because it did not question the venire regarding all of the principles set forth in the rule and did not ask the venire whether they “understood” and “accepted” any of the principles. The State asserts that defendant has forfeited review of this issue by failing to object at trial or raise the issue in a posttrial motion, and defendant responds that we should review this issue under the plain-error doctrine.

Although an error is generally not preserved for review unless the defendant objects at trial and includes the error in a written posttrial motion, the plain-error rule bypasses normal forfeiture principles and permits reviewing courts to consider unpreserved error in certain circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). A reviewing court may consider unpreserved error under the plain-error doctrine when the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or the error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

Pursuant to Rule 431(b), a trial court is required to ask each potential juror, individually or in a group, whether that juror “understands and accepts” each of the following principles:

“(1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the

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defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The language of Rule 431(b) is clear and unambiguous and mandates a specific question and response process in which the trial court must ask each potential juror, either individually or in a group, whether he or she understands and accepts each of the principles set forth in the rule and provide each prospective juror with an opportunity to respond to those questions. *People v. Thompson*, 238 Ill. 2d 598, 607 (2010).

In this case, the trial court questioned the venire in the following manner:

"THE COURT: There are certain things that apply – principles that apply to criminal cases that would apply to the case of People versus Cory [sic] Paige. One of these principles is that the defendant, Cory [sic] Paige, is presumed innocent of the charges against him, and that presumption remains with him through every stage of the trial and is not overcome unless by your verdict you come to the conclusion that the state has proven him guilty beyond a reasonable doubt.

Anybody have any difficulty or quarrel with the principle that the defendant is presumed innocent of the charge against him and that the state must prove him guilty beyond a reasonable doubt?

(No response.)

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THE COURT: Again, no response.

In conjunction with that principle is the additional one, which is that the state in this case, Miss Gambino and Miss Rosen and Mr. Kent, has the burden of proving guilt beyond a reasonable doubt, and that burden stays on the state throughout the entire trial. The defendant is not required to prove to you he's innocent of the charges against him.

Does anyone have any difficulty or quarrel with the principle that the state must prove guilt beyond a reasonable doubt, the defendant must prove nothing to you?

(No response.)

THE COURT: Again, no response.

In conjunction with those two principles and kind of going along hand in hand with them is the additional principle that the defendant, Cory [sic] Paige, has the absolute right to remain silent. He can sit and not testify on his own behalf and rely upon the presumption of innocence.

If that eventually should happen to occur, you as jurors can draw no inferences from the fact that he chooses to remain silent either in favor of Cory [sic] Paige or against Cory [sic] Paige if he chooses to remain silent.

Does anybody have any difficulty or quarrel with the principle that an accused person has the absolute right to remain silent and not testify?

(No response.)”

The record thus shows that the trial court asked the potential jurors whether they “had any

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difficulty or quarrel with” the principles set forth in Rule 431(b), rather than whether they “understood and accepted” them. While it may be clear that the prospective jurors accepted each principle that they did not have a “difficulty or quarrel with,” it is not clear that the prospective jurors understood such principles, as the word “difficulty” has multiple meanings. The word “difficulty” can mean “the quality or state of being difficult” (Merriam-Webster Online Dictionary (2011), *available at* <http://www.merriam-webster.com/dictionary/difficulty> (last visited Mar. 2, 2011)), in which case a prospective juror may be indicating that he or she does not find the principle difficult to understand by stating that he or she does not have “difficulty” with it. However, the word “difficulty” can also mean “controversy, disagreement,” or “objection,” in which case a prospective juror may be indicating that he or she has no disagreement with and accepts the principle by stating that he or she does not have “difficulty” with it. *Id.*

In addition, although the trial court questioned the prospective jurors about defendant’s right not to testify and right to rely upon the presumption of innocence, it did not question them regarding the principle that he was not required to offer any evidence on his own behalf. Also, the trial court questioned the potential jurors regarding “the principle that an accused person has the absolute right to remain silent and not testify,” rather than whether they understood and accepted the principle that his failure to testify could not be held against him. Rule 431(b) requires the trial court to ask the potential jurors specific questions as to whether they both understand and accept each of the four principles set forth therein, and we therefore conclude that the court did not comply with that rule in this case. *Thompson*, 238 Ill. 2d at 607.

Defendant asserts that the trial court’s error constituted plain error in this case because the

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evidence was closely balanced. Under the first prong of the plain-error doctrine, a reviewing court may consider unpreserved error when the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error. *Piatkowski*, 225 Ill. 2d at 565.

Defendant maintains that the evidence was closely balanced because none of the witnesses testified that they saw him shoot a gun, he tested negative for primary gunshot residue, and the only evidence linking him to the shooting was the testimony of Ortiz and Rodriguez, who were inebriated at the time of the shooting, testified inconsistently with each other, and were unable to identify him in court. The State responds that the evidence of defendant's guilt was overwhelming under an accountability theory.

A person is legally accountable for the conduct of another when “[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid such other person in the planning or commission of the offense.” 720 ILCS 5/5-2(c) (West 2006). To prove that the defendant possessed the intent to promote or facilitate a crime, the State must present evidence establishing beyond a reasonable doubt that the defendant shared the criminal intent of the principal or that there was a common criminal design. *People v. Perez*, 189 Ill. 2d 254, 266 (2000).

We initially determine that there is overwhelming evidence that one of the three men who were in the van with Ortiz and Rodriguez shot Robles and that defendant was one of those three men. Omar Barba testified that the man who shot Robles got into a van after the shooting. Officers Caballero, Altamirano, and Sebastian testified that the van was pursued southbound on

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Western, and Ortiz testified that the gun that was used in the shooting was thrown out of the van window while they were being chased. Marcelo Liera observed someone throw a gun out of a speeding van being chased by the police near 63rd and Western, which Investigator Harvey then collected. Brian Parr tested that gun, compared it with firearm evidence recovered from Robles' body, and determined that the firearm evidence found in Robles' body had been fired by the gun collected by Investigator Harvey. In addition, Officer Sebastian testified that he saw defendant, Gonzalez, and Serrano flee the van at the conclusion of the car chase and that defendant was subsequently chased down by another officer and taken into custody. Although Ortiz was unable to provide an in-court identification of any of the men in the van and Rodriguez was only able to identify Serrano as the man in the red shirt in court, Ortiz and Rodriguez both identified photographs of all three men shortly after the shooting and confirmed the accuracy of those pictures during their testimony.

We further determine that the State presented sufficient evidence to establish that defendant aided in the planning and commission of the offense and shared the criminal intent of Serrano and Gonzalez and that there was a common criminal design among defendant, Gonzalez, and Serrano to drive around the south side of Chicago and shoot at members of rival gangs. Ortiz and Rodriguez both testified that the men in the van were in the Ambrose street gang and that defendant exited the van with Serrano immediately prior to the shooting, then reentered the van with him after the gunshots had been fired. Ortiz also testified that the men talked about where to go before deciding on 26th Street, where they said the Latin Kings were located. Ortiz further testified that defendant suggested that someone represent that they were in the Latin

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Kings by making the Latin Kings gang sign prior to the shooting of Robles and suggested that Gonzalez say “LaRazza love” prior to firing shots on 18th Street and that Gonzalez heeded both suggestions. In addition, the evidence showed that defendant exited the van and ran away, along with Gonzalez and Serrano, at the conclusion of the car chase, unlike Ortiz and Rodriguez, who remained in the vehicle. See *People v. Hart*, 214 Ill. 2d 490, 519 (2005) (defendant’s flight constitutes a circumstance from which the trier of fact could infer a consciousness of guilt).

Although Ortiz and Rodriguez were inebriated on the night of the shooting and their testimony was not identical as to the full course of events that occurred that night, their testimony was largely consistent regarding the sequence of events leading up to, including, and following the shooting. Both Ortiz and Rodriguez testified that they went to Lincoln Park with Gonzalez and Serrano prior to picking up defendant, that Serrano obtained the gun after they stopped in an alley, that the men in the van were in the Ambrose gang, that defendant and Serrano jumped out of the van immediately before the shooting and then reentered the van after the shots had been fired, that the van was involved in a car chase with the police, and that all three men fled the van after the chase had ended. In addition, Ortiz’s testimony that Gonzalez fired shots at members of the LaRazza gang on 18th Street is consistent with Rodriguez’s testimony that Gonzalez exited and then reentered the van when Serrano stopped the vehicle after the shooting near 26th Street had occurred and before the car chase had begun.

Thus, Ortiz and Rodriguez did not provide “drastically different accounts of the evening,” as asserted by defendant, and to the extent that conflicts existed in their testimony, some conflicts were to be expected where they witnessed the events under traumatic circumstances. *People v.*

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*Brooks*, 187 Ill. 2d 91, 133 (1999). Also, the consistencies between the testimony of Ortiz and Rodriguez, including their identical testimony that defendant and Serrano exited the van before the shooting and then reentered the van after the shots had been fired, lends credibility to their testimony on that subject, in contrast with Barba's testimony that he only saw Robles and the shooter on the street at the time of the shooting.

We also note that although none of the witnesses testified that defendant fired a gun on the night of the shooting and gunshot residue testing of his hands revealed that he may not have discharged a firearm, the State was not required to establish that he had fired a gun to prove him guilty beyond a reasonable doubt under an accountability theory. In addition, Mary Wong testified that gunshot residue evidence may be removed from a subject's hands by sweat or by activities such as running and jumping, which are activities that defendant engaged in during the foot chase that ensued after he fled the van with Gonzalez and Serrano.

The evidence presented at trial thus shows that defendant, Gonzalez, and Serrano were in the van with Ortiz and Rodriguez on the night of the shooting and that one of the three men shot Robles. The testimony of Ortiz and Rodriguez also shows that the three men were members of the Ambrose gang and discussed where to go on the night of the shooting, that they chose the area of 26th Street because the Latin Kings were there, that Gonzalez represented that they were in the Latin Kings gang and the LaRazza gang based on defendant's suggestions to that effect, and that defendant exited the van with Serrano prior to the shooting and reentered the van with him after the shooting had occurred. Although defendant's mere presence at the scene of the crime does not render him accountable for the offense, a trier of fact may consider evidence

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showing that he participated in the criminal scheme, that he voluntarily attached himself to a group bent on illegal acts with knowledge of their design, and that he fled from the scene in determining his legal accountability. *Perez*, 189 Ill. 2d at 267-68. We thus conclude that the evidence of defendant's guilt was not so closely balanced that the trial court's failure to strictly comply with Supreme Court Rule 431(b) threatened to tip the scales of justice against him, and we therefore also conclude that the first prong of the plain-error doctrine does not provide a basis for excusing his procedural default of this issue in this case.

### III. Jury Instruction

Defendant next contends that the trial court erred by refusing defense counsel's request to give the jury an addict instruction. Jury instructions are given to provide the jury with correct legal principles that apply to the evidence and to enable the jury to reach a proper conclusion based on the applicable law and the evidence presented. *People v. Parker*, 223 Ill. 2d 494, 500 (2006). It is for the trial court to consider the facts and governing law and determine whether the jury should be instructed on a particular subject. *People v. Simms*, 192 Ill. 2d 348, 412 (2000). If an appropriate Illinois pattern jury instruction (IPI) exists, it must be used, but the decision of whether to give a non-IPI instruction rests within the sound discretion of the trial court. *Id.*

The record shows that defense counsel submitted two non-IPI instructions to the trial court that each instructed that "[t]he testimony of a drug or alcohol abuser must be examined and weighed by the jury with greater care than the testimony of a witness who does not abuse drugs and alcohol" and that "[t]he jury must determine whether the testimony of the drug or alcohol abuser has been affected by drug or alcohol use." One instruction also related that "Veronica

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Rodriguez may be considered to be an abuser of drugs or alcohol” and the other instructed that “Renya [sic] Ortiz may be considered to be an abuser of drugs or alcohol.”

At the jury instruction conference, defense counsel asserted that it was clear from the testimony of Ortiz and Rodriguez that they had an extensive drug habit and a history of daily marijuana use, which affected their credibility as witnesses, and the State responded that there was insufficient evidence that they were drug addicts to warrant the giving of the requested instruction. The trial court ruled that it was not going to give the instructions requested by defense counsel because they were not warranted in this case. In doing so, the court stated that in *People v. West*, 156 Ill. App. 3d 608 (1987), this court held that the inclusion of a jury instruction similar to those proposed by defense counsel in this case would have unduly highlighted one particular aspect of a witness’ testimony and noted that the general trend was to get away from instructions that commented on specific types of evidence or gave undue emphasis to different pieces of evidence in a case. The trial court also noted that Ortiz and Rodriguez were cross-examined extensively regarding their use of drugs and their ability to recall and recollect the events that occurred on the night of the shooting.

Defendant asserts that the testimony of Ortiz and Rodriguez regarding their observations on the night of the shooting deserved special scrutiny because they were crucial eyewitnesses for the State and that they admitted to being “wasted” on the night of the incident and to using large quantities of marijuana on a daily basis at the time of the shooting. The State responds that the trial court did not abuse its discretion by declining to give the requested jury instruction because the jury was fully apprised of the drug use of Ortiz and Rodriguez by their extensive testimony

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and defense counsel's numerous comments during closing argument on the subject and the instruction would have placed undue emphasis on a single portion of the evidence.

It is not reversible error for a trial court to deny a tendered addict instruction where the jury has been presented with sufficient evidence of the witnesses' addiction to make its own determination as to the believability of the witnesses. *People v. Steidl*, 142 Ill. 2d 204, 238 (1991); *People v. Adams*, 109 Ill. 2d 102, 123 (1985). In this case, Ortiz and Rodriguez were each cross-examined regarding their daily marijuana use at the time of the shooting and that they were both "wasted" on the night of the shooting. The record also shows that defense counsel referenced the witnesses' marijuana use and intoxication on the night of the shooting numerous times during closing argument to assert that they were not credible witnesses. We thus determine that the jury was fully apprised of the extent to which Ortiz and Rodriguez were using marijuana at the time of the shooting and was therefore able to make its own determination as to their believability. In addition, given the extent of the evidence and argument presented on the issue to the jury, there is a danger that had the trial court given the requested jury instruction, it would have unduly highlighted that one particular aspect of the witnesses' character or ability to perceive. *West*, 156 Ill. App. 3d at 612. We therefore conclude that the trial court did not abuse its discretion by declining to give the jury instructions requested by defense counsel.

#### IV. Presentence Custody Credit

Defendant further contends, and the State agrees, that although he was entitled to receive 893 days in presentencing custody credit, his mittimus incorrectly reflects that he is entitled to 891 days in presentencing custody credit. The record shows that defendant was arrested on

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September 12, 2006, and remained in custody for a total of 893 days until he was sentenced on February 12, 2009. A defendant shall be given credit on his sentence for the time spent in custody as a result of the offense for which the sentence was imposed. 730 ILCS 5/5-8-7(b) (West 2006). We therefore order that the mittimus be corrected to reflect 893 days of presentence custody credit. Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999).

Accordingly, we affirm the judgment of the circuit court of Cook County and order that defendant's mittimus be amended.

Affirmed; mittimus amended.